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IN THE SUPREME COURT OF THE STATE OF IDAHO

SUPREME COURT NO. 39195-2011

DONETTA I. KAFADER)
)
Plaintiff/Appellant,)
)
vs.)
)
KIMBERLY A. BAUMANN)
)
Defendant/Respondent.)
_____)

RESPONDENT'S BRIEF

Appeal from the District Court of the Fifth Judicial District
for the County of Twin Falls

Honorable Randy J. Stoker, Presiding

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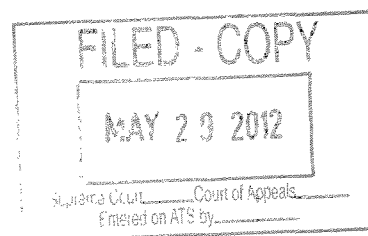


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I.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This appeal arises out of the jury trial of a lawsuit stemming from a low-impact rear end automobile collision in which Appellant sustained only soft tissue damage to her neck. Appellant now challenges the District Court's denial of her Motion for Additur or in the Alternative New Trial. After a two day jury trial, the Appellant sought relief pursuant to Idaho Rule of Civil Procedure 59(a)(5) and (6), contending that the jury should have awarded her more money. In a fourteen (14) page Memorandum Opinion and Order Denying Plaintiff's Motion for Additur and in the Alternative for a New Trial ("Order"), the District Court rejected Appellant's arguments. This appeal followed.

B. COURSE OF PROCEEDINGS BELOW

Appellant commenced this negligence action on October 7, 2010 in the Fifth Judicial District of the State of Idaho, County of Twin Falls. R., 8. A pretrial hearing was held on July 5, 2011, where the District Court granted Respondent Kimberly Baumann's (hereinafter "Baumann" or Respondent) Motion to Allow the Videotaped Trial Testimony of Dr. Richard Knoebel, Alternatively, Motion for Continuance. R., 179-83. The videotaped deposition of Dr. Knoebel was taken on July 13, 2011. Supp. Transcript on Appeal, at 4. More than fourteen (14) days before trial, Baumann served on the Appellant a \$25,000 offer of judgment pursuant to Idaho Rule of Civil Procedure 68. R., 289-291. Appellant did not accept the offer of judgment. R., 342-44.

A two day jury trial was held on July 19 and 20, 2011; the Honorable Randy J. Stoker, District Judge, presided. Transcript on Appeal. The only issues tried were causation and damages. R., 335. The jury awarded Appellant \$2,787.50 in economic damages and \$15,000 in non-economic general damages. R., 336. A judgement was entered on July 26, 2011. R., 263-264. After the trial, both parties sought recovery of their trial costs and the Appellant filed a Motion for Additur and in the Alternative Motion for New Trial. The District Court denied Plaintiff's Motion for Additur and in the Alternative Motion for New Trial and awarded net costs to the Defendant in the amount of \$1,988.41. R., 344. An amended judgment was entered on August 23, 2011.

C. STATEMENT OF FACTS

This is a personal injury lawsuit resulting from a low-impact automobile collision that occurred in Kimberly, Idaho, on October 20, 2008 (hereinafter the "Accident"). Transcript on Appeal, 88-9. Baumann rear-ended the Appellant at a speed of approximately 10-15 mph. Transcript on Appeal, 89. The Appellant did not seek medical attention at the scene of the Accident, but went to the emergency room for *lower back* pain later in the day after of the accident. Transcript on Appeal, 211.

The Appellant confirmed during the trial that she first sought treatment for the injury forming the primary basis of her damage claim, pain in her *upper back* and *cervical area*, a couple of days after the Accident. Transcript on Appeal, 212. Subsequently, the Appellant began obtaining treatment from chiropractor Dr. Brad Turner, and then approximately six months after the Accident from neurologist, Dr. Hammond. Transcript on Appeal, 113.

The jury heard evidence about the Appellant's medical history, which included several prior back surgeries, pre-existing neck cervical pain and fibromyalgia. Transcript on Appeal, 100-04, 303, 162-63, 315, 168, 175; R. 333. Appellant described how, after the Accident, she was injured in a Winco parking lot, and, as a result, had commenced a personal injury lawsuit arising from that incident. Transcript on Appeal 242-57. During cross-examination, Appellant recounted how the injuries she sustained in the Winco incident affected her life in ways that significantly accorded with how the injuries caused by the Accident affected her life. Transcript on Appeal 242-57.

At trial, Baumann presented the videotaped controversy of Dr. Richard Knoebel. Supp. Transcript on Appeal. In contrast to the testimony of Appellant's medical witnesses, Dr. Knoebel testified that the Appellant did not sustain significant, permanent or long-term injury, and that Appellants' Complaints were more likely consistent with her preexisting pain complaints. Supp. Transcript on Appeal, 9-10, 13-15.

D. STANDARD OF REVIEW

This Court reviews a District Court's ruling on a motion for new trial for an abuse of discretion. *See Palmer v. Spain, M.D.*, 138 Idaho 798, 800, 69 P.3d 1059, 1061 (2003); *see also Sheridan v. St. Lukes Reg'l Med. Ctr.*, 135 Idaho 775, 780, 25 P.3d 88, 93 (2001). Unless the District Court abused its discretion, this Court affirms the District Court's ruling. *See Sheridan v. St. Lukes Reg'l Med. Ctr.*, 135 Idaho at 780, 25 P.3d at 93. In reviewing a discretionary matter, this Court performs a three part analysis to determine if the District Court: (1) "corrected perceived the

issue as discretionary; (2) acted within the boundaries of its discretion and consistently with applicable legal standards; and (3) reached its decision by an exercise of reason.” *See Palmer v. Spain, M.D.*, 138 Idaho at 800, 69 P.3d at 1061.

II.

RESPONDENT’S RESTATEMENT OF THE ISSUES THAT HAVE BEEN PRESENTED ON APPEAL BY THE APPELLANT AND THE RESPONDENT’S REQUEST FOR AN AWARD OF COSTS AND ATTORNEY’S FEES ON APPEAL

1. Did the District Court abuse its discretion in denying Plaintiff’s Motion for New Trial pursuant to Idaho Rule of Civil Procedure 59(a)(5)?
2. Did the District Court abuse its discretion in denying Plaintiff’s Motion for New Trial pursuant to Idaho Rule of Civil Procedure 59(a)(6)?
3. Is Respondent entitled to award of attorney’s fees under Idaho Code §12-121.

III.

ARGUMENT

In this instance, the District Court correctly perceived that the decision to grant a Motion for New Trial Brought Under Idaho Rule of Civil Procedure 59(a)(5) and (6) is a matter of discretion. *See R. 336, 338*. Therefore, the analysis turns to whether the District Court acted within the bounds of its considerable discretion in reaching its decision, and whether it exercised reason in reaching its decision. *Palmer v. Spain, M.D.*, 138 Idaho at 800, 69 P.3d at 1061. As discussed below, it is evident the District Court acted within its discretion in reaching its decision, and manifestly exercised a high level of reason in denying Appellants’ Motion for Additur and in the Alternative

for a New Trial.

A. The District Court Did Not Abuse Its Discretion in Denying Appellant's Motion for New Trial Brought Under Idaho Rule of Civil Procedure 59(a)(5).

The Appellant moved for a new trial pursuant to Idaho Rule of Civil Procedure 59(a)(5), which authorizes the District Court to grant a new trial for “inadequate damages, appearing to have been given under the influence of passion or prejudice.” I.R.C.P. 59(a)(5). The District Court also may conditionally grant a new trial subject to additur. *See* I.R.C.P. 59.1.

Under Idaho Rule of Civil Procedure 59(a)(5), the District Court “*must* weigh the evidence and then compare the jury’s award to what he would have given had there been no jury. If the disparity is so great that it appears to the trial court that the award was given under the influence of passion or prejudice, the verdict ought not stand.” *Teton Springs v. V.R. Invests.*, 145 Idaho 716, 718-19. In ruling on a motion for a new trial, the district court should distinguish the grounds upon which it is based. *See Quick v. Crane*, 111 Idaho 759, 773, 727 P.2d 1187, 1201 (1986). Although less explanation is required in *denying* a motion for new trial than in granting one, the trial court still must identify “where in the record it reveals, that the moving party has failed to meets its burden to justify granting the motion.” *See id.*, 111 Idaho at 773, 727 P.2d at 1201.

Here, the District Court weighed the evidence, compared the jury’s award to what the District Court would have awarded if there was no trial, and concluded the “verdict was not so disparate with a reasonable view of the evidence as to suggest an award under the ‘influence of passion or prejudice’.” R., 340. In so doing, the District Court pointed to various parts of the record that

revealed why the Appellant failed to establish the jury's verdict was "given under the influence of passion or prejudice" see Idaho Rule of Civil Procedure 59(a)(5), and observed that the jury's \$15,000 award of general damages was in line with what the Court would have awarded at a bench trial, "given the finding that the cervical injury was not permanent." R., 340.

As to the purported "permanence" of the Appellant's injury, the District Court observed that the evidence was "highly contested." For example, Baumann's expert, Dr. Knoebel, testified that Appellant sustained "no significant injury or long-term permanent injury" as a result of the Accident. Supp. Transcript on Appeal, 9-10, 13-15. Dr. Knoebel added that Appellant's "chronic pain complaints are most consistent with her preexisting chronic pain complaints," including fibromyalgia, and "not the motor vehicle accident." Supp. Transcript on Appeal, 9-10, 13-15. From the evidence the jury heard, the District Court reasoned that it could reasonably conclude the Appellant's cervical injury was not permanent. R., 339. The District Court also observed that the jury heard evidence from which it could conclude the motor vehicle accident was minor. R., 340.

Moreover, the District Court pointed out that the jury heard evidence the Appellant had a preexisting lower back condition and "numerous medical issues . . . including "highly disputed testimony about whether Plaintiff had pre-existing fibromyalgia." R., 333. Indeed, during cross-examination, and contrary to Appellant's representation that there was "no medical record that established or corroborated either an accurate diagnosis of fibromyalgia or any ongoing treatment for the condition," see Appellant's Brief at 16, Appellant's own neurologist conceded that he

prescribed her “Cymbalta . . . for the fibromyalgia aspects of her symptoms.” *See* Transcript on Appeal, at 175. The same neurologist admitted that the Federal Drug Administration approved another drug prescribed the Appellant, Savella, “strictly” for fibromyalgia. *See* Transcript on Appeal, at 303; 162-63. Then Dr. Hammond equivocated about whether he really ever treated the Appellant for fibromyalgia, stating that the “reason” he reported fibromyalgia in his “accurate” records was to “try and get her medical coverage to pay for it.” *See* Transcript on Appeal, at 315; 168; 175. The jury heard ample evidence that Appellant was treated for and had a history of fibromyalgia.

Appellant’s apparent contention that the District Court *should have* expressly found Plaintiff’s medical service providers more credible and, as a result, reversed the jury’s decision, misapprehends the judge’s role in deciding a 59(a)(5) motion. First, as the District Court noted, there was evidence in the record challenging the credibility and biases of the medical witnesses, which would include Appellants’. R., 341. Second, it is “a jury function to set the damage award based on its sense of fairness and justice” and the “trial judge must defer to the jury, *unless* it is apparent to the trial judge that there was a great disparity” between the jury’s verdict and what the trial judge would have awarded such that it “shocks the conscience” or is unconscionable *See Beale v. Speck*, 127 Idaho 521, 536, 903 P.2d 110, 125 (App. 1995). In this case, the District Court expressly stated that the \$2,787.50 in special damages was consistent with a finding that the Appellant’s cervical injury was not permanent. R., 339. This conclusion was buttressed by the fact

that Appellant's medical services witnesses offered no testimony as to how to apportion damages between Appellant's extensive preexisting injuries and those caused by the Accident. R., 339. Moreover, the District Court observed that the \$15,000 award in general damages was consistent with the evidence the jury heard. R., 340.

Simply put, the District Court's analysis denying the Appellant's Motion for New Trial under Idaho Rule of Civil Procedure 59(a)(5) was within the outer bounds of the court's permissible discretion and well-reasoned. *See Beale v. Speck*, 127 Idaho at 536, 903 P.2d 110 at 125 (affirming District Court's denial of motion for new trial under Rule 59(a)(5) based on disputed evidence that failed to "shock the conscience" or appeared to have been the result of "passion or prejudice"). This case involved hotly disputed evidence and impeached witnesses. As such, this case is factually distinguishable from *Dinneen v. Finch*, where the defendant failed to controvert the Plaintiff's evidence of personal injury, lost wages and personal property. *See* 100 Idaho 620, 626, 603 P.2d 575, 561 (1979). Therefore, the rule that a jury or fact-finder must accept as true the uncontradicted testimony of unimpeached witnesses is inapplicable. *See id.* 100 Idaho at 626-27, 603 P.2d at 561-62. There is no manifest abuse of the District Court's wide discretion. *See Sheridan v. Jambura*, 135 Idaho at 788, 25 P.3d at 101.

B. The District Court Did Not Abuse Its Discretion in Denying Appellant's Motion for New Trial Brought Under Idaho Rule of Civil Procedure 59(a)(6).

Under Idaho Rule of Civil Procedure 59(a)(6), the District Court "must weight the evidence and determine (1) whether the verdict is against his or her view of the clear weight of the evidence;

and (2) whether a new trial would produce a different result.” *Schwan’s Sales Enterprises, Inc. v. Idaho Transportation Dept.*, 142 Idaho 826, 833, 136 P.3d 297, 304 (2006); *see also Harger v. Teton Springs Golf & Casting, LLC*, 145 Idaho 716, 719, 184 P.3d 841, 844 (2008). “If, having given full respect to the jury’s findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial.” *Quick v. Crane*, 111 Idaho at 768, 727 P.2d at 1196, *quoting U.S. v. U.S. Gypsum Co.*, 333 U.S. 364 (1948).

Applying these principles, it is evident the District Court did not abuse its wide discretion in denying the Plaintiff’s Motion for New Trial pursuant to Idaho Rule of Civil Procedure 59(a)(6). The District Court’s Memorandum Decision spent approximately three pages summarizing the evidence submitted by both parties to the jury. R., 332-335. Based on that evidence, the Court could not “say that the jury’s verdict in this case is against the clear weight of the evidence.” R., 341. The District Court reiterated that the pivotal issue was whether Appellant proved that her injury was permanent. R., 341. The District Court noted that there was substantial evidence in the record to support each party’s position, and, furthermore, sufficient evidence challenging the bias and credibility of the medical witnesses. R., 341. Likewise, the District Court observed that “[c]redible arguments can be and were made in support” of the parties’ respective positions. R., 341. Because of the District Court’s “unique position of having heard all of the testimony and examined all of the evidence,” its “weighing of the evidence in a motion for new trial is given considerable discretion.”

See Sheridan v. Jambura, 135 Idaho at 790, 25 P.3d at 103. The mere fact that the Appellant thought her medical providers were more credible than Dr. Knoebel is irrelevant to the issue before this Court, which is whether the District Court abused its discretion in ruling that the jury's verdict was not against the *clear weight* of the evidence. The District Court's reasoning is solid. There was no abuse of discretion.

Nor did the District Court abuse its discretion in addressing the second prong required when analyzing whether to grant a new trial under Idaho Rule of Civil Procedure 59(a)(6). The District Court considered whether a "new trial would produce a different result;" however, it could not rule that a new trial would change the result. R., 341; *see Sheridan v. Jambura*, 135 Idaho at 790, 25 P.3d at 103. While the District Court astutely acknowledged that a different trial *could* reach a different result, it noted that the test was whether it *would*. R., 341. And having tried personal injury cases with facts similar to the one at issue here, the District Court stated that the results of those cases were "very similar" to the jury's verdict in the instant case. R., 341. The Trial Court did not abuse its discretion in declining to find that a new trial would produce a different result.

C. The Court Should Deny Appellant's Request for Attorneys' Fees Pursuant to I.C. § 12-121 and Instead Award Baumann Attorneys' Fees.

The Appellant's request for attorneys' fees pursuant to Idaho Code § 12-121 is ponderous, lacks merit and, as such, the Court should deny it. The gist of Appellant's argument is that the District Court's error in denying Appellant's motion for new trial was so obvious and so egregious that it was frivolous for Baumann not to wave a white flag and concede defeat. *See* I.C. §12-121;


see also Rudd v. Merritt, 138 Idaho 526, 533, 66 P.3d 230, 237, 244 (2003). The speciousness of Appellants' contention is made clear by some simple facts. First, the jury did not agree with the Appellant's valuation of the case. Second, Baumann did not agree with Appellant's valuation of the case.¹ And third, the District Court did not agree with Appellant's valuation of the case. The same facts, however, are evidence that Appellant has pursued this appeal frivolously and unreasonably such that an award of Idaho Code § 12-121 attorneys' fees to Baumann is warranted.

IV.

CONCLUSION

Baumann respectfully urges this Court to affirm the District Court's Memorandum Opinion and Order Denying Plaintiff's Motion for Additur and in the Alternative for a New Trial. Furthermore, Baumann requests that the Court deny Appellant's request for attorney's fees pursuant to Idaho Code § 12-121, and, instead, grant Baumann an award of attorney's fees pursuant to that statute. Baumann also requests costs incurred on appeal.

Respectfully Submitted this 29 day of May, 2012.



Michael E. Kelly
Attorney for the Respondent

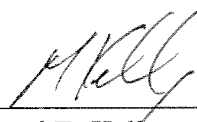
¹ Recall that Baumann served a \$25,000 dollar offer of judgment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29 day of May, 2012, two true and correct copies of the foregoing RESPONDENTS' BRIEF were served upon the following:

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